

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 03-136772

Employee: Susan Gierer
Employer: Bank of America
Insurer: American Home Assurance Co.
Date of Accident: October 22, 2003
Place and County of Accident: St. Louis City, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 18, 2007. The award and decision of Administrative Law Judge Suzette Carlisle, issued July 18, 2007, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 4th day of January 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be modified.

I agree with the administrative law judge's finding that employee is entitled to compensation in this claim. However, I disagree with the administrative law judge's finding that employee is not entitled to an award of either past medical expenses or future medical care and treatment. The administrative law judge also only awarded employee 12½% permanent partial disability to the body as a whole referable to the low back for her October 22,

2003 injury. I believe the award should be modified to increase the award of permanent partial disability to 20%.

Permanent Partial Disability

The extent and percentage of a disability is a finding of fact within the special province of the Commission. *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726, 732 (Mo.App. W.D. 2000) (overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo.banc 2003)). The Commission may consider all of the evidence, including the employee's testimony, and draw reasonable inferences in arriving at the percentage of disability. *Id.*

I believe the evidence supports that employee is entitled to a greater percentage of disability than awarded by the majority. Employee testified as to her limitations as a result of her back injury as well as to the persistent pain associated with her condition. She testified that she suffered from pain radiating into her right shoulder, neck, and right lower extremity. She testified that it was extremely difficult to perform daily activities and chores and that she was no longer able to engage in activities such as gardening and golfing. There is no indication that employee was magnifying her symptoms. Employee did not complain of any lumbar or thoracic pain prior to her accident on October 22, 2003.

The administrative law judge seemed to give great credence to the opinion of Dr. Lange who last saw employee on January 13, 2004. Dr. Lange completed his report in 2006 without further examination of employee, only reviewing her records before completing his report. Even so, the medical records from the doctors who evaluated employee showed that employee's condition continued to deteriorate. In contrast to Dr. Lange, Dr. Feinberg was able to evaluate and examine employee on multiple occasions in 2004 as well as in 2005 and 2006. Dr. Feinberg opined that employee suffered a permanent partial disability of 27% of the body of the whole referable to the lumbar spine and 10% of the body as a whole referable to the thoracic spine related to the injury on October 22, 2003. I believe the evidence supports a permanent partial disability of 20% to the body of a whole referable to the low back as a result of her October 22, 2003 accident.

Past Medical Expenses

The administrative law judge erred in finding that employee was not entitled to past medical expenses due to the fact that she failed to seek additional medical treatment from employer. The administrative law judge's finding is not supported by the record, but even if true does not preclude an award of past medical expenses. Employee was referred to Dr. Lange, an orthopedist, who examined her and ordered physical therapy. Employee underwent physical therapy and was later released by Dr. Lange. On January 22, 2004, employee requested additional treatment from Dr. Lange which was denied. Employee continued to experience leg numbness and severe pain. Employee sought treatment from Dr. Barry Feinberg in February of 2004. Dr. Feinberg prescribed physical therapy and provided a right facet joint injection which offered employee minimal relief. Dr. Feinberg released employee and referred her to Dr. Scodary for a neurosurgical consult. Employee went on to seek treatment from Drs. Magner, Gahn, Bailey, Utech, and Guarino. Employee sought this additional treatment because her symptoms persisted and she was denied treatment from Dr. Lange who opined that she was in need of no further medical treatment after January 22, 2004. It is clear from the record that employee continued to suffer from symptoms well after January 22, 2004. Therefore, it is unreasonable to penalize employee for seeking treatment on her own, given the doctor she was referred to by employer neither provided her additional treatment, nor referred her for further treatment.

Furthermore, a sufficient factual basis to award past medical expenses exists when employee identifies all of the medical bills as being related to and the product of the work-related injury and the medical bills are shown to relate to the professional services rendered by medical records in evidence. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo.banc 1989). Employee satisfied her burden of proof as she properly offered into evidence all medical bills pertaining to treatment for her work-related injury and testified that such medical bills and treatment were related to and the product of that injury.

Future Medical Care and Treatment

The administrative law judge erred in determining that employee has not proven the need for ongoing medical care and treatment. Future medical benefits may be awarded if employee shows by "reasonable probability" that he is in need of additional medical treatment by reason of his work-related accident. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo.App. E.D. 1997). Employee continues to take medications to relieve her symptoms caused by the accident on October 22, 2003. Therefore, employee has established that the need for future medical care is reasonably probable.

Conclusion

Employee has shown that she is entitled to a greater degree of disability than awarded by the administrative law judge in this case. She has also met her burden of proof showing that her past medical expenses were related to and the product of the work-related injury and that there is a reasonable probability of a need for additional medical care and treatment. Accordingly, I would modify the decision of the administrative law judge to increase the award of permanent partial disability to 20% and award past medical expenses as well as future medical care and treatment.

For the foregoing reasons, I respectfully dissent from the majority's decision.

John J. Hickey, Member

AWARD

Employee:	Susan Gierer	Injury No.:	03-136772
Dependents:	N/A	Before the	
Employer:	Bank of America	Division of Workers'	
Additional Party:	N/A	Compensation	
Insurer:	American Home Assurance Co.	Department of Labor and Industrial	
Hearing Date:	May 4, 2007	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	SC:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: October 22, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis City, Mo.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes

11. Describe work employee was doing and how accident occurred or occupational disease contracted:
While carrying a file drawer, Claimant dropped it and bent over to retrieve it; injuring her back.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: 12.5% referable to the low back
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? \$1,976.09

Employee: Susan Gierer Injury No.: 03-136772

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: Sufficient to reach maximum rates of compensation
19. Weekly compensation rate: \$662.55/\$347.05
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:	
Unpaid medical expenses:	-0-
weeks of temporary total disability (or temporary partial disability)	-0-
50 weeks of permanent partial disability from Employer	\$17,352.50

22. Second Injury Fund liability: No

TOTAL: \$17,352.50

23. Future requirements awarded: None

Said payments to begin and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Mark Akers

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Susan Gierer Injury No.: 03-136772

Dependents: N/A

Employer: Bank of America

Additional Party: N/A

Insurer: American Home Assurance Co.

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: SC:tr

PRELIMINARIES

Susan Gierer ("Claimant") requested a hearing for a final award pursuant to §287.450 RSMo (2000). A hearing was held at the Missouri Division of Workers' Compensation (DWC) St. Louis office, on May 4, 2007. Attorney Mark Akers represented Claimant. Attorney Peter Maher represented Bank of America ("Employer") and American Home Assurance Co. ("Insurer"). The Second Injury Fund was not a party to this proceeding. All exhibits were admitted into evidence without objection. Any notations found on the exhibits were present when admitted into evidence. The record closed after presentation of evidence. Hearing venue is correct and jurisdiction properly lies with DWC.

STIPULATIONS

The parties have stipulated that on or about October 22, 2003:

1. Claimant was employed by Employer.
2. Claimant sustained an injury by accident arising out of and in the course of employment.
3. The injury occurred in St. Louis City, Missouri.
4. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law.
5. Employer's liability was fully insured by Insurer.
6. Employer had notice of the injury.
7. The Claim for Compensation was filed within the time prescribed by law.
8. Claimant's average weekly wage was sufficient to result in maximum rates for temporary total disability (TTD) and permanent partial disability (PPD). The rates are \$662.55 for TTD and \$347.05 for PPD.
9. Claimant has been paid no TTD benefits to date.
10. Claimant received \$1,976.09 in medical benefits.

ISSUES

1. Liability for past medical expenses;
2. Future medical prescriptions;
3. TTD for four weeks from December 1, 2004 to December 27, 2004 totaling \$2,610.20; and
4. Permanent partial disability.

SUMMARY OF THE EVIDENCE

All of the evidence was reviewed, but only evidence supporting this award is summarized below.

Live Testimony

Claimant is married and has one adult daughter. She worked for Employer from February 1991 to March 2006. Claimant still works for Employer but currently receives long term disability of \$2,883.34 per month. As a Senior Business Credit Specialist and Vice President in charge of agricultural lending; she determined credit worthiness, performed credit analysis and recruited prospective customers. Much of the work was performed by telephone sitting at a desk. Claimant earned \$64,000.00 a year performing these tasks. Lifting duties were not a significant part of her responsibilities.

The Work Injury

On October 22, 2003, Claimant moved office furniture within the office. While carrying a file drawer, Claimant dropped it and bent over to retrieve it; jarring her back. Claimant heard two pops in her back, felt pain, and fell to her knees. Claimant picked up the drawer and moved it to the new location. She testified she felt a hot knife-like pain in her upper back, low back tightness, right buttock and thigh pain; a stabbing warm pain to the knee, calf, and foot and numbness from the thigh down.

She reported the injury to her supervisor, Robert Reynolds and continued to work. A week later Claimant requested medical treatment and Mr. Reynolds suggested she see her personal physician. However, Claimant requested a workers' compensation doctor. Mr. Reynolds authorized Claimant to seek treatment at St. Luke's Hospital where medication was prescribed. Failing to see improvement, Claimant contacted Insurers' representative and requested additional treatment.

Dr. Lange examined Claimant at Employer's request and prescribed physical therapy. However, Claimant continued to have pain when sitting or standing and right leg numbness and pain. After Dr. Lange released Claimant she sought treatment from the following doctors on her own:

Dr. Feinberg provided a lumbar spine injection; ordered an MRI; but did not recommend surgery. Claimant began making co-payments when Dr. Feinberg provided treatment.

Daniel Scodary, M.D., a neurosurgeon, diagnosed a bulge at T11-T12 and S1 based on the MRI. By this time, Claimant's complaints increased to include burning and aching with stabbing pain to Claimant's low back, buttock, hip, thigh, and feet. She described pain in her hip as a "hitch in my giddy-up," which felt like bone rubbing bone when she walked. Dr. Scodary did not recommend surgery.

Dr. Magner, a chiropractor, provided adjustments which Claimant testified helped. Claimant is seeking reimbursement for out-of-pocket co-pays.

Dr. Bailey, a neurosurgeon, prescribed medication and water exercises and referred Claimant to Dr. Ghan. Dr. Ghan, a pain specialist, provided at least twenty injections and physical therapy through Core Services but did not recommend surgery.

Dr. Kitchens, also a neurosurgeon, examined Claimant but did not recommend surgery. Dr. Jones, a psychiatrist, currently provides medication for sleep problems. Lori Utech, M.D., Claimant's primary physician, currently prescribes medication.

Dr. Guarino provides injections, medication, and more physical therapy if needed. Claimant has been told the pain will continue to increase until surgery is needed. However, at this point no doctor is recommending surgery and she does not want it. Dr. Guarino referred Claimant to Dr. Margherita for a functional capacity evaluation.

Claimant received short term relief from massage therapy recommended by Drs. Ghan and Utech. Claimant received relief from acupuncture but is not requesting reimbursement.

Claimant seeks reimbursement for co-payments made to Core Services for physical therapy totaling \$6,580.00. Claimant testified therapy was reasonable and necessary treatment. Claimant also sought reimbursement for co-payments made to Drs. Bailey, Magner and Feinberg. Receipts are contained in Exhibit M.

Claimant was paid short term disability from July 5, 2004 through November 2004. She did not receive short term disability from December 1 to December 27, 2004, and seeks TTD as she did not believe she could work due to sleep deprivation. She often dozed at work and her job required her full attention. Claimant also testified it would take up to two years to make accommodations to her work area.

Claimant cannot clean house or change sheets. Activity increases the pain level from 7 to 10. Claimant has difficulty doing laundry, walking down stairs, and can no longer split wood for the fireplace. She cannot trim or mow the lawn, play golf, or ride a boat as long as she once did. Claimant has gained fifty pounds due to inactivity. Claimant weighed 180 pounds before the injury and now weighs 237 pounds and stands 5 feet, 4 inches tall. Claimant engages in sex less often and it is not as enjoyable. She cannot sit for a full Cardinals game due to pain. Claimant and her husband shop together because neither can carry much weight. Other complaints include limping, right sided pain of the low back, hip, buttocks, mid and upper back extending to the neck and shoulder blades, numbness of the right shoulder and hands, and inability to sleep.

Mr. Robert Reynolds, a Senior Vice-President and City Manager for Employer, supervised Claimant at the time of the accident. He testified the offices were moved 50 feet on October 22, 2003. Before the move, Mr. Reynolds instructed employees not to move heavy items because arrangements had been made to move them. Alternatively employees could place items on a push cart and some opted to roll them on a chair.

He did not dispute the accident. He testified Claimant is a valued employee and the company is willing to provide her with time off for doctors' appointments. The company was ready to accommodate her needs. Upon her return to work experts planned to observe her workstation and customize the area to meet her needs. He expected it would take two weeks for changes to be implemented.

Deposition Testimony

David Lange, M.D., a board certified orthopedic surgeon, examined Claimant and prescribed physical therapy at Employers' request. Based on physical examination and complaints, Dr. Lange diagnosed a possible annular tear within the L5-S1 disc, but not a herniation.

In 2004 Dr. Lange opined Claimant attained maximum medical improvement (MMI), rated 5% PPD of the body as a whole for the low back, and released Claimant from medical care.

Dr. Lange provided an independent medical evaluation (IME) in 2005 and 2006 each time finding Claimant remained at MMI. After reviewing medical records from Drs. Bailey, Gahn, and Kitchens, and reviewing diagnostics, Dr. Lange concluded no further treatment was needed, and the PPD had not changed since Claimant's 2004 release. Dr. Lange opined the radicular symptoms noted on the 2004 nerve conduction study resulted from leakage caused by the tear.

Barry Feinberg, M.D., a board certified physician in pain management, treated Claimant at the request of her attorney from January 2004 to April 2004. Dr. Feinberg diagnosed lumbar radiculopathy and right-sided sacroiliac dysfunction. An MRI revealed minimal disc bulging at T11-T12, left lateral foraminal disc protrusion versus small herniation at S1-S2. A myelogram revealed narrowing at L5-S1 with spurring and degenerative changes at S1. Claimant saw no improvement, so Dr. Feinberg released her to seek an opinion from Dr. Scodary.

Dr. Feinberg provided an IME on November 8, 2005. He found Claimant to be a MMI, recommended massage therapy, medication, and work restrictions which limited repetitive bending, stooping, and lifting in forward flexed position.

Dr. Feinberg found the low and mid back problems were caused by the October 2003 work-related accident. He further opined the accident aggravated the preexisting degenerative condition resulting in radiculopathy and pain. Dr. Feinberg rated 20% PPD of the low back and 10% PPD of the mid back for the primary injury, and 15% of the low back for the preexisting low back condition.

Dr. Feinberg performed a second IME in November 2006 after Claimant treated with Dr. Ghan, Core Services, Dr. Guarinao, Dr. Margherita, and Dr. Guarino. He diagnosed chronic radiculopathy at L5-S1 and sacroiliac dysfunction. He testified degenerative disc disease irritated the L5-S1 level which caused an annular tear that is common with degenerative conditions. He concluded either the nerve was compressed or there was a leakage of material in the L5-S1 disc, but he recommended no further treatment. Dr. Feinberg increased the rating to 27% of the lumbar spine due to Claimant's increased complaints and motor weakness.

Medical Evidence

In October 2000, Claimant complained of right sided low back pain after reaching for toothpaste, and was treated by Paul Hinrichs, D.O. Medication, ice and rest were prescribed.

Claimant obtained full body massages from Wellness Therapies from December 2003 to March 2005 with some pain relief.

An MRI in March 2004 revealed a transitional segment, partially lumbarized at S1, posterior disc bulge at S1-S2 and T11-T12. Similar findings were made in November 2004 and July 2005.

In May 2004 Dr. Scodary concurred with Dr. Lange's diagnosis after examining Claimant and recommended a pain evaluation.

Gregory Bailey, M.D., provided conservative treatment between June 2004 and November 2004. Nerve conduction studies revealed chronic radiculopathy at the S1 root. Dr. Bailey prescribed aquatic therapy and medication.

Michael Magner, M.D., provided chiropractic treatment to Claimant from July 2004 to September 2004. He diagnosed disc herniation and lumbar pain with radiculopathy.

Richard Gahn, M.D., treated Claimant from August 2004 to May 2005, and diagnosed lumbar spondylosis/degenerative disc disease, disc bulge at S1-S2 and T11-T12, and lumbar facet joint pain. No relief was obtained from bilateral lumbar facet joint injections rhizolysis, multiple injections, and physical therapy with Core Rehab Services, Inc. between March and June 2006.

Daniel Kitchens, M.D, treated Claimant between January 2005 and July 2005. Chronic S1 radiculopathy was diagnosed and mild degenerative changes at L4-L5 and L5-S1. Claimant was discharged after unsuccessful conservative treatment.

Anthony Guarino, M.D. treated Claimant at Dr. Utech's request beginning July 2006 and continues to provide medication and injections. He diagnosed chronic low back pain with radiculopathy.

Anthony Margherita, M.D., examined Claimant's functional capacity in November 2006 and diagnosed chronic radiculitis. Dr. Margherita restricted lifting to 10 pounds occasionally, no bending, squatting, crawling, or climbing, occasional lifting above shoulders, sitting for two hours, and standing and walking 1 hour each during an eight hour workday.

FINDINGS OF FACT and CONCLUSIONS OF LAW

After careful consideration of the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Burden of Proof

Claimant bears the burden of proving an accident occurred and it resulted in injury. *Dolen v. Bandera's Cafe & Bar*, 800 S.W.2d 163, 164 (Mo.App.1990) (Overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W. 3d 220, 223 (Mo banc 2003). For an injury to be compensable, the evidence must establish a causal connection between the accident and the injury. *Silman v. William Montgomery & Associate* 891 S.W.2d 173, 175 (Mo.App. 1995) (Overruled by *Hampton*, 121 SW. 3d. at 223).

Permanent partial disability

The parties stipulated Claimant sustained an accident which arose out of and in the course of employment and Claimant is entitled to PPD. However, they disagree on the nature and extent of Claimant's disability.

A permanent partial award is intended to cover claimant's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. *Phelps v. Jeff Wolk Const. Co.* 803 S.W.2d 641, 646 (Mo.App. 1991) (overruled on other grounds by *Hampton*, 121 S.W. 3d. at 223). The determination of the specific amount or percentage of disability is a finding of fact within the special province of the fact finder. The fact finder is not strictly limited to the percentages of disability testified to by the medical experts. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983) (Overruled on other grounds by *Hampton*, S.W.2d at 223).

Dr. Lange rated Claimant 5% permanently disabled based on a disc injury due to a possible annular tear. During the last examination, Claimant complained of occasional discomfort in her right low back; extending to her buttock and thigh. Examination was normal except for low back pain with heel walking and flexion. Dr. Lange's medical records do not contain mid back complaints or treatment. Dr. Feinberg rated 27% PPD of the low back and 10% of the mid back. I find Claimant sustained 12.5% PPD of the low back from the primary injury.

Past medical expenses

Claimant asserts Employer and Insurer are responsible for unpaid medical expenses which were not authorized by Employer. In post-hearing briefs Claimant asserts the medical expenses total \$11,440.00. Employer contends Dr. Lange provided reasonable and necessary medical care to relieve the effects of the 2003 work injury.

Section 287.140.1(2000) states the employee shall receive and the employer shall provide medical, surgical, chiropractic, and hospital treatment,...as may reasonably be required after the injury... to cure and relieve from the effects of the injury. If the employee desires, [she] has the right to select [her] own physician, surgeon, or other such requirement at [her] own expense. Section 287.140.10 gives the employer the right to select the physician, surgeon, chiropractor or other health care provider as outlined.

I find Claimant did not meet her burden to prove Employer was liable for the unauthorized medical expenses. Employer authorized and paid for the medical treatment provided by Dr. Lange. During Dr. Lange's final examination, Claimant reported significant improvement. The examination was normal except for discomfort when heel walking and with full extension. Dr. Lange determined Claimant had attained MMI and released her from medical care.

She treated with three neurosurgeons, four pain specialists, physical therapists, a chiropractor, masseuse, her primary care physician, and an acupuncturist. No referral was made by Employer or Dr. Lange to those medical providers. Claimant did not request Employer provide additional treatment, despite making two earlier requests. Claimant admitted she sought treatment on her own; which she had the right to do; at her own expense.

In addition, the unauthorized treatment did not cure or relieve Claimant from the effects of the injury. In fact, she and Dr. Feinberg testified her condition worsened. Dr. Feinberg hoped seeing Dr. Scodary would "put something to rest" for Claimant.

I find the treatment provided by Dr. Lange was reasonable to cure and relieve Claimant from the effects of the 2003 work related injury. For the reasons stated above, I do not find Employer liable for the unauthorized medical treatment Claimant received.

Future Medical Expenses

Claimant asserts Employer is liable for future prescriptions, and Employer disagrees. In 2004 Dr. Feinberg agreed with Dr. Lange's diagnosis and discharged Claimant with no treatment recommendations except home exercises. Dr.

Feinberg still did not recommend treatment when asked for an IME in 2005 and 2006, concluding both times that Claimant had reached MMI and required no additional treatment. After reviewing Claimant's lengthy self-directed medical history, Dr. Lange confirmed his opinion that Claimant reached MMI in 2004.

I find Dr. Lange's opinion more persuasive. Dr. Lange is an orthopedic surgeon. Therefore, his opinion is entitled to more weight regarding treatment for orthopedic injuries. Claimant's own doctor did not recommend additional treatment. None of the doctors found Claimant to be a surgical candidate. As stated above, any treatment Claimant continues to receive flows from the unauthorized treatment. Therefore, I find Claimant has not met her burden to show future prescriptions/medical treatment is needed for injuries she sustained in the 2003 work related accident.

Temporary total disability

Claimant asserts she is entitled to TTD benefits from December 1, 2004 to December 27, 2004 totaling \$2,610.20. Employer contends Claimant is not entitled to TTD benefits as the only evidence of entitlement is Claimant's testimony.

The test for entitlement to TTD "is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market under his physical condition." **Boyles v. USA Rebar Placement, Inc.**, 26 S.W.3d 418, 424 (Mo.App.2000) (Overruled by **Hampton**, 121 SW. 3d. at 223). Thus, TTD benefits are intended to cover the employee's healing period from a work-related accident until she can find employment or her condition has reached a level of maximum medical improvement. **Id.** Once further medical progress is no longer expected, a temporary award is no longer warranted. **Id.** Claimant has the burden of proving entitlement to TTD benefits by a reasonable probability. **Thorsen v. Sachs Elec. Co.** 52 S.W.3d 611, 621(Mo.App. 2001) (Overruled by **Hampton**, 121 SW. 3d. at 223).

I find Claimant did not prove entitlement to TTD benefits. Dr. Lange returned Claimant to work on November 23, 2003, December 16, 2003, and released her from care on January 13, 2004 with no restrictions. Dr. Lange's records contain no mention of Claimant being unable to work due to sleep deprivation. Dr. Utech's records reflect approval for short term disability from December 2nd to December 27th, however there is no indication the time off was related to the October 2003 work injury. Therefore, I find Employer is not responsible for TTD benefits.

CONCLUSION

Claimant sustained accident which arose out of and in the course of employment. Employer is liable for 12.5% permanent partial disability benefits of the low back. Claimant's attorney is entitled to a 25% lien.

Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Acting Division Director
Division of Workers' Compensation